

JOHN M. KAHENY  
ANITA M. NOONE  
LESLIE J. GIRARD  
SUSAN M. HEATH  
CASEY G. GWINN  
ASSISTANT CITY ATTORNEYS

SHARON A. MARSHALL  
DEPUTY CITY ATTORNEY

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

John W. Witt

CIVIL DIVISION  
1200 THIRD AVENUE, SUITE 1200  
SAN DIEGO, CALIFORNIA 92101-4184  
TELEPHONE (619) 533-5800  
FAX (619) 533-5847

**MEMORANDUM OF LAW**

**DATE:** October 29, 1996

**NAME:** Ron Graham, Safety Manager, Risk Management Department

**FROM:** City Attorney

**SUBJECT:** Confidentiality of Medical Records

**QUESTIONS PRESENTED**

By memorandum dated April 22, 1996, you asked the City Attorney for a legal opinion regarding retention of medical records. Specifically, you ask which employee records that may have medical information should be considered personnel records and which should be considered medical records. The designation of records may determine where the records are retained. A copy of your memorandum is enclosed, along with its attachments.

**BACKGROUND**

Currently, when an employee is injured on the job, a number of forms are generated within the employee's department where the injury occurred, and the Risk Management Department, where claims are processed. The forms are on NCR paper and copies of each report are kept by both departments. Some of the information on the forms is background information regarding when, where, and how the injury occurred. Other forms include medical evaluations, doctors reports and work restrictions. Because these forms contain a mix of personnel and medical information, there is concern by Risk Management that confidential information is accessible to individuals who do not have the right to review such information. This concern has led you to request guidance on the appropriateness of maintaining the current recordkeeping practice.

### ANALYSIS

The question you ask has no simple answer. I found no general legal definition of "medical records." However, section 32128 of the California Health & Safety Code prescribes a list of minimal requirements for hospitals with regard to records. Section 32128(a)(4) mandates that hospitals prepare and maintain accurate medical records. The section defines medical records to include, but does not limit them to: "identification data, personal and family history, history of present illness, physical examinations, special examinations, professional or working diagnosis, treatment, gross and microscopic pathological findings, progress notes, final diagnosis, condition on discharge, and other matters as the medical staff shall determine."

Thus, in response to the first part of your question, the definition of "medical records" is broad, at least as defined by statute, and it encompasses in some fashion all of the forms you submitted for evaluation. Each of the forms includes some request for information that would qualify the form as a medical record under Section 32128; since we find no other definitive or descriptive definition of medical record, this statutory definition will serve as the basis for our recommendations.

The second part of your inquiry asks which forms required by the City should be included in employee personnel files that are accessible to the appointing authority when he or she is evaluating a potential candidate for promotion or transfer. Pursuant to California Government Code section 12940(d), employers may request medical information of an applicant only if the requested information directly relates to the position for which an applicant is applying, or in those instances when the information is necessary or helpful in determining whether the applicants will be a danger to themselves or others. To allow an employer access to employee medical records which are not specifically relevant to the position being sought, or which do not address one of these issues, would violate the statute.

Consequently, to state that certain medical records are always or never disclosable is problematic. The relevance of medical information must be determined on a case-by-case basis according to the requirements of the job being sought. For example, applicants who apply for jobs which require heavy lifting should allow potential employers access to personal medical information that refers to prior back injuries or lifting restrictions. However, this same position would probably not require medical information regarding hearing problems or poor eyesight because such physical conditions lack relevance to the job being sought.

Some of the information found on the forms is not strictly medical. Rather, it is information that describes how the incident occurred and any visible wounds that resulted. These forms do not contain medical information generated by a physician or medical facility.

Thus, reports generated by supervisors may stay with the personnel file in most instances. However, later in the process, when comments from the physician are also included on the forms, the records would fall into the statutory definition of medical records and should then be retained by Risk Management for review and dissemination only when appropriate and necessary.

### **CONCLUSION**

A case-by-case evaluation of an employee's personnel file for relevant medical information is the only method that can adequately safeguard the employee's privacy, while permitting the employer access to necessary job-related information. Ultimately, Risk Management must exercise its discretion in determining what information to include in employee personnel files. You might consider instituting an administrative review process through which City departments may request and obtain relevant medical information on prospective employees prior to transfer or promotion.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall  
Deputy City Attorney

SAM:jrl:mb:045(x043.2)  
Attachments  
ML-96-52